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No. 08-688

Supreme Court, U.S.
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In The

Supreme Court of the United States

JERRY ALFRED FUTCH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can criminal liability be imposed under Section 13(a)(2) of the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) without a finding that the defendant had the criminal intent to manipulate the price of a commodity?

2. If § 13(a)(2) does not require manipulation, does it still apply to Petitioner's activities in an exempted market?

PARTIES TO THE PROCEEDING

Petitioner is Jerry Alfred Futch, Jr. ("Futch"). Futch is an individual.

Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jerry Alfred Futch, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unreported Opinion of the Fifth Circuit is located at 278 Fed.Appx. 387, 2008 WL 2062263 (C.A.5 (Tex.))

JURISDICTION

The order of the Court below affirming Petitioner's Appeal was entered May 15, 2008. (Appendix A) A timely petition for rehearing and a suggestion for rehearing en banc was denied on August 20, 2008. (Appendix B) This petition is filed within ninety (90) days of that date. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 7 U.S.C. § 13(a)(2) of the Commodity Exchange Act, reads in pertinent part:

§ 13. Violations generally; punishment; costs of prosecution

(a) Felonies generally

It shall be a felony punishable by a fine of not more than $1,000,000 or imprisonment for not more than 10 years, or both, together with the costs of prosecution, for:

* * *

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to corner or attempt to corner any such commodity or *knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce*, [. . .]

7 U.S.C. § 13 (emphasis added).

The *Final Order Regarding the Exemption for Certain Contracts Involving Energy Products* reads in pertinent part:

. . . [W]hereas, this order also encompasses persons offering into, entering into, rendering advice or rendering other services with respect to the agreement, contract, or transaction which is the subject of this

> Order, for such activity; The Commission, pursuant to section 4(c) of the Act, hereby exempts from all provisions of the Commodity Exchange Act, 7 U.S.C. 1 et seq., except sections 2(a)(1)(B) of the Act and the provisions of sections 6(c), 6c, 6(d) and 9(a)(2) of the Act, to the extent that these provisions prohibit manipulation of the market price of any commodity in interstate commerce . . .

58 Fed. Reg. 21286 (1993).

STATEMENT

Petitioner was employed as a natural gas trader for Reliant Energy ("Reliant") in Houston, Texas. Petitioner traded natural gas forward contracts off-exchange in the spot or cash market. Petitioner transacted on electronic exchanges, through brokers, and directly with counter-parties with whom he had a standardized contract[1] and established credit. Petitioner was not registered with the Commodity Futures Trading Commission ("CFTC") and did not trade natural gas futures contracts on the New York Mercantile Exchange ("NYMEX").

On November 29, 2000, Petitioner sent an email to *Inside FERC*, a private publication that publishes a price index for the natural gas market. *Inside*

[1] These transactions are all subject to a contract between the parties approved by the Gas Industries Standards Board.

FERC compiles the submissions by the industry participants and formulates their opinion of the price of natural gas at different delivery points across the nation. Included in Petitioner's November 29, 2000, email were false volumes and prices for transactions with counter-parties.

On November 17, 2004, Petitioner was indicted for violations of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq*. (the "CEA"). Specifically, Petitioner was charged with violations of 7 U.S.C. § 13(a)(2), which prohibits the interstate transmission of false, misleading or knowingly inaccurate market information that affects or tends to affect the price of a commodity in interstate commerce. It was not alleged in the indictment that Petitioner sent the email with intent to manipulate the price of natural gas, only that the information within the email was false and that the information could "tend to affect" the price of a commodity.

Petitioner filed a motion in the district court, arguing that § 13(a)(2) must require a *mens rea* other than the knowing transmission of a false statement.

On June 16, 2005, Petitioner entered a plea of guilty to one count of violating § 13(a)(2). The factual basis does not contain any evidence that Petitioner sent the information with the intent to manipulate the price. On March 14, 2006, the district court sentenced Futch to serve fifty-seven months in the custody of the Bureau of Prisons, with a two-year term of supervised release. At the Fifth Circuit,

Petitioner raised *inter alia* that in pleading guilty he had not waived the jurisdictional defect regarding the failure of the indictment to allege manipulation and that the CFTC's *Final Order Regarding the Exemption for Certain Contracts Involving Energy Products* (Energy Exemption) exempted his conduct from CEA oversight.

Petitioner is currently incarcerated in the Federal Correctional Institution in Beaumont, Texas.

The Fifth Circuit's Opinion

The Fifth Circuit wholly ignored Petitioner's argument regarding *mens rea*. Disregarding Petitioner's entire point of error, the Court held that the elements the Government must prove to show a violation of § 13(a)(2) are: (1) that a defendant knowingly delivered market reports or market information through interstate commerce, (2) that the information was knowingly false or misleading, and (3) that the information "affected or tended to affect the price of a commodity in interstate commerce." App. A, p. 7.

Additionally, the Fifth Circuit gave scant attention to Petitioner's discussion regarding the 1993 Energy Exemption, saying only: "The 1993 Final Order explicitly states that § 13(a)(2) continues to apply to the energy markets that are otherwise exempted from the CEA by the order. 58 Fed. Reg. at 21291." App. A, p. 9. The opinion ignores the language of the Energy Exemption regarding

manipulation, again avoiding Petitioner's discussion regarding *mens rea*.

Mens Rea, Fair Notice, and the *Chevron* Deference

As this Court has previously observed "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples v. United States*, 511 U.S. 600, 604, 114 S.Ct. 1793, 1796, 128 L.Ed.2d 608 (1994) *citing Liparota v. United States*, 471 U.S. 419, 424, 105 S.Ct. 2084, 2087, 85 L.Ed.2d 434 (1985). Determining the mental state required for commission of a federal crime requires "construction of the statue and ... inference of the intent of Congress." *Staples, id., citing United States v. Balint*, 258 U.S. 250, 253, 42 S.Ct. 301, 302, 66 L.Ed. 604 (1922).

In determining the above elements of the crime, the Fifth Circuit held that manipulative intent is not necessary to prove a violation of the statute. This interpretation exposes the inherent ambiguity in the statute regarding the required *mens rea* and conflicts with decisions in other jurisdictions holding that manipulative intent is required.[2] In holding that the only *mens rea* for a violation of § 13(a)(2) is the

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[2] *See United States v. Reliant Energy Services*, 420 F.Supp.2d 1043 (N.D. Cal. 2006) and *Utesch v. Dittmer*, 947 F.2d 321, 325 (8th Cir.1991).

making of an intentionally false statement, the Fifth Circuit has created a statute from "whole cloth" which is not supported by Congressional intent. Under this reading, § 13(a)(2) has two different *mens rea* requirements within the same sentence.[3]

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). Within the statutory framework of the Act, manipulation, cornering and disseminating false crop reports are separated only by a comma. Parsing the statute to read that a portion of a subsection requires a different *mens rea* violates this fundamental canon. This interpretation also leads to the odd result that an individual who delivers a false statement regarding a market condition is punished equally with an individual who specifically intends to manipulate the market price of a commodity.

In *Staples, id.*, this Court addressed the *mens rea* requirement for possession of a machine gun in violation of 26 U.S.C. § 5861(d). The Court addressed the "particular care" this Court has taken "to avoid construing a statute to dispense with *mens rea* when

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[3] One district court recently determined that the "key verbs" that define the criminal offense within §13(a)(2) are "manipulate" and "corner." *United States v. Radley*, 558 F.Supp.2d 865, 874 (N.D. Ill. 2008).

doing so would criminalize a broad range of apparently innocent conduct." *Staples, id.* at 610. This reasoning is instructive in the present case. The Fifth Circuit's interpretation of the statute's ambiguity criminalizes enormous amounts of "otherwise innocent conduct."[4] It is easy to think of almost infinite hypothetical situations where an individual could make a false statement regarding market conditions and unknowingly be in violation of the Commodity Exchange Act.[5] Under the lower Court's holding, the speaker's intent that the statement later affects or "tends to affect" the price of a commodity is irrelevant to their guilt. Based on this expansive reading, the statute punishes otherwise innocent conduct.

Fair notice is a right of federal constitutional dimension, grounded in the due process guarantee, established by the Supreme Court, and requiring that

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[4] While intentional falsehoods are not protected speech for First Amendment analysis, they are not proscribed and still constitute otherwise innocent conduct. Making false statements may not be acceptable, but some things are "so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Staples, id.* at 611.

[5] For example, as Petitioner said in his Reply Brief to the Fifth Circuit: The wife of a grocer in Pittsburgh is on vacation in Florida. In an effort to extend her vacation and enjoy the beautiful sunny weather, she sends her husband the following fictitious email: "Dear Frank, the weather is terrible here in Florida – golf ball sized hail – I can't fly out. See you soon, Phyllis." In response to this email, Frank raises the price of oranges at his market.

a criminal statute "give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S.Ct. 1697, 1701, 12 L.Ed.2d 894 (1964). This Court has outlined three manifestations of the fair notice doctrine: (1) the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague or ambiguous that persons of common intelligence must necessarily guess at its meaning and differ as to its application; (2) the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered; and (3) due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *See United States v. Lanier*, 520 U.S. 259, 266-67, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432 (1997).

The law requires "[. . .] that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). A deprivation of the right of fair warning can result not only from ambiguous statutory language but also from an unforeseeable and retroactive judicial expansion of a statutory scheme. As this Court has recognized, "judicial enlargement of a criminal act by interpretation is

at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. United States*, 314 U.S. 306, 311, 62 S.Ct. 237, 239 (1941) *citing Bouie,* 378 U.S. at 353.

Both § 13(a)(2) and the Fifth Circuit's interpretation run afoul of these principles of fair notice. Not only is the statute ambiguous as to what *mens rea* is required, by interpreting the statute as not requiring manipulation, the Fifth Circuit has judicially enlarged the statute to include conduct that was never intended to be within the purview of the CEA. The proposed reading gives the CFTC authority over any person in the United States who makes a false statement over the phone or via email regarding some market condition (e.g., weather) that unintentionally "tends to affect the price of a commodity."

The Fifth Circuit's interpretation also directly conflicts with another Circuit's reading of the statute. In *Utesch v. Dittmer,* 947 F.2d 321, 325 (8th Cir.1991), the Eighth Circuit directly held that the false statements portion of § 13(a)(2) requires manipulative intent. *Utesch* involved a private civil action brought under § 13(a)(2) [then § 13(b) of the Act].[6] The Eighth Circuit held that in order to succeed on the claim of

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[6] This Court recognized a private right of action under the criminal provisions of the CEA to those who could show a violation of the Act and damages from that violation. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982).

false statements or manipulation, it was necessary for the plaintiff to prove that the defendant's actions were intended to and did manipulate the price. As the Eighth Circuit held: "[U]nder either theory, it was necessary for the plaintiff to prove that Dittmer's and Rathco's actions were intended to and did produce an artificially low price. . . ." *Utesch,* 947 F.2d at 325.

This ambiguity regarding the *mens rea* within § 13(a)(2) is not merely theoretical, it has been judicially recognized and is plainly evidenced by the inconsistency in its application. In *United States v. Reliant Energy Services*[7] the district court specifically noted that §13(a)(2) does not specify what *mens rea* is required for a criminal violation but recognized that the government had conceded the statute requires specific intent. The Court stated: "Although the criminal manipulation provision does not specify a required *mens rea,* the government accepts that specific intent is required." *Reliant Energy Services*, 420 F.Supp.2d at 1052. In that case the government specifically stated: "*The price manipulation provision * * * criminalizes the knowing and intentional manipulation or attempted manipulation of a price or commodity in interstate commerce * * * .*" *Id.* (emphasis added).

The admission by the United States Attorney in *Reliant Energy Services* is directly contrary to their

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[7] 420 F.Supp.2d 1043 (N.D. Cal. 2006).

indictment of Petitioner and their other criminal cases brought under § 13(a)(2) in the Southern District of Texas. *See United States v. Singleton*, No. 06-cr-80 (S.D. Tex.); *United States v. Valencia*, No. 04-cr-514 (S.D. Tex.); and *United States v. James Brooks, et al.*, No. 04-cr-512 (S.D. Tex. Nov. 17, 2004) (all charging violations of § 13(a)(2) with no allegation of manipulative intent.) The Northern District of California also alleged criminal manipulative intent in *United States v. McDonald, et al.*, No. 06-cr-265 (N.D. Calif. April 13, 2006) (Almost identically alleging a manipulation of the price of natural gas in interstate commerce by falsely reporting to *Inside FERC* in violation of 7 U.S.C. § 13(a)(2)).

Instructively, when bringing charges under § 13(a)(2) for allegations regarding "false reporting" to index publications, the CFTC has consistently alleged manipulative intent. See *CFTC v. Johnson, et al.*, No. 05-33 (S.D. Tex. filed Feb. 1, 2005); *CFTC v. Atha, et al.*, No. 05-cv-29 (N.D. Ga. filed Feb. 1, 2005); *CFTC v. Whitney*, No. 05-cv-33 (S.D. Tex filed Feb. 1, 2005); *CFTC v. Reed*, No. 05-cv-17 (D.Colo. filed Feb. 1, 2005); *CFTC v. Foley*, No. 05-cv-840 (S.D. Ohio filed Sep. 20, 2005). By way of example, in *Atha*, the Complaint specifically states:

> "The false or misleading or knowingly inaccurate reports Defendants delivered, or caused to be delivered, to IFERC [. . .] was market information that affects or tends to affect the price of natural gas, a commodity in interstate commerce, and Defendants

> knowingly delivered, or caused to be delivered, those reports in an attempt to manipulate the price of natural gas, a commodity in interstate commerce." *CFTC v. Atha, et al.*, No. 05-cv-29 (N.D. Ga. filed Feb. 1, 2005), Complaint, para. 37.[8]

The Complaint in *Whitney* states similarly: "... through his submission of false or misleading or knowingly inaccurate reports concerning natural gas transactions, Defendant attempted to manipulate the price of natural gas, in violation of sections [...] 7 U.S.C. §§ 9, 13b, and 13(a)(2)." *CFTC v. Whitney*, No. 05-cv-33 (S.D. Tex. filed Feb. 1, 2005), Complaint, para. 7.[9]

The CFTC has repeatedly interpreted § 13(a)(2) as requiring manipulative intent; this interpretation is accorded deference based on this Court's decision in *Chevron* and its progeny.[10] Federal courts should give deference to an agency's interpretation of a law when (1) Congress has delegated authority to that agency to make rules having the force of law, and the agency has adopted an interpretation pursuant to this

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[8] http://www.cftc.gov/files/enf/05orders/enf-atha-mcdonald-whalen.pdf.

[9] http://www.cftc.gov/files/enf/05orders/enf-whitney.pdf.

[10] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 231-234, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S.Ct. 2688, 2708, 162 L.Ed.2d 820 (2005).

authority; (2) the statute is ambiguous; and (3) the agency's interpretation of the statute is reasonable or permissible. If these three conditions are met, the agency's interpretation is entitled to what is known as the " *Chevron* deference."

This Court has previously decided that the Commodity Futures Trading Commission is the agency to whom Congress has delegated the authority to interpret and enforce the Commodity Exchange Act. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844, 106 S.Ct. 3245, 3253, 92 L.Ed.2d 675 (1986) (granting "considerable weight" to CFTC's interpretation of CEA pursuant to *Chevron*). In the present case, the *Chevron/Mead* conditions are met: (1) the CFTC is the agency that has been congressionally delegated to interpret and enforce the Commodity Exchange Act, their rules having the force of law; (2) § 13(a)(2) is ambiguous on its face and is being interpreted in different ways by different branches of the government; and (3) the agency's interpretation of the law by bringing enforcement actions alleging manipulative intent is reasonable and consistent with the statutory framework. Accordingly, the CFTC's interpretation as requiring manipulative intent should be given "controlling weight" as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782.

As has been recognized by the Court in *Reliant Energy Services* and as shown by its inconsistent application, § 13(a)(2) is ambiguous as to whether

manipulative intent is required for a violation. The Fifth Circuit's decision to resolve the ambiguity by not requiring manipulative intent is not supported by the prior decisions of the CFTC or the Department of Justice.

Under the *Chevron* deference the CFTC's interpretation is entitled to controlling weight. Finally, pursuant to the rule of lenity this ambiguity must be resolved in Petitioner's favor. As this Court just recently confirmed:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 128 S.Ct. 2020, 2024, 170 L.Ed.2d 912 (2008) (internal citations omitted).

The *Exemption for Certain Contracts Involving Energy Products*

In 1993 Congress passed a Final Order entitled *Exemption for Certain Contracts Involving Energy Products* (Energy Exemption). 58 Fed. Reg. 21286

(April 13, 1993). The Energy Exemption covers specifically the type of off-exchange natural gas transactions that Petitioner engaged in. It states in pertinent part:

> And whereas, this order also encompasses persons offering, entering into, rendering advice or rendering other services with respect to the agreement, contract, or transaction which is the subject of this Order, for such activity; The Commission, pursuant to section 4(c) of the Act, hereby exempts from all provisions of the Commodity Exchange Act, 7 U.S.C. 1 et seq., except sections 2(a)(1)(B) of the Act and the provisions of sections 6(c), 6c, 6(d) and 9(a)(2)[11] of the Act, *to the extent that these provisions prohibit manipulation of the market price of any commodity* in interstate commerce or for future delivery on or subject to the rules of any contract market, the following transactions, entered into on or after October 23, 1974: Contracts for the purchase and sale of crude oil, condensates, *natural gas*, natural gas liquids or their derivatives which are used primarily as an energy source, and which: (1) Are entered into by and between participants covered by this Order, having at initiation of the contract a reasonable basis to believe that its counterparty is also within the terms of this Order; (2) Are bilateral contracts between

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[11] The Energy Exemption refers to 7 U.S.C. § 13(a)(2) by its numbering system within the CEA, § 9(a)(2).

> two parties acting as principals, the material economic terms of which are subject to individual negotiation by the parties; and (3) Impose binding obligations on the parties to make and receive delivery of the underlying commodity or commodities, with no right of either party to effect a cash settlement of their obligations without the consent of the other party (except pursuant to a bona fide termination right), provided, however, that the parties may enter into a subsequent book out, book transfer, or other such contract which provides for settlement of the obligation in a manner other than by physical delivery of the commodity specified in the contract.

58 Fed. Reg. 21286, 21294 (emphasis added).

The Energy Exemption was a confirmation of the CFTC's position that they had never regulated the off-exchange energy markets. As Acting Chairman of the CFTC William Albrecht explained in the concurrence accompanying the Order:

> I believe public policy dictates that the Commission exempt the market before us today from Commission regulation. There does not appear to be any reason sufficient to justify Commission regulation, nor any necessity for the Commission to involve itself in this market. *I view this market, its transactions, and participants as clearly within the scope intended by Congress for the exercise of the Commission's new exemptive authority.*

58 Fed. Reg. at 21294-21295 (emphasis added).

In other words, as contemplated by the CFTC and Congress, § 13(a)(2) does not apply to Petitioner's natural gas trading except to the extent there is an allegation of manipulation. The Fifth Circuit avoided this issue altogether and said simply that, "The 1993 Final Order explicitly states that § 13(a)(2) continues to apply to the energy markets that are otherwise exempted from the CEA by the order." App. A, p. 9. From a plain reading of the entire statutory scheme, it becomes clear that not only does the CFTC interpret § 13(a)(2) to require manipulative intent, the only portions of the CEA that apply to Petitioner are those that would accuse him of price manipulation. The Commission, as evidenced by the official statements of the Commissioner, clearly believes that Petitioner (as a participant in the excluded market) is exempted from all portions of the CEA, except for allegations of manipulation. This is the interpretation by the agency mandated to enforce the CEA. It has the force of law, and should be given deference by this Court.

***Commodity Futures Trading Comm'n v. Dunn*, 519 U.S. 465, 467-468 (1997).**

In *Dunn* this Court analyzed the Treasury Amendment (7 U.S.C. § 2(ii)). As the Energy Exemption is to off-exchange energy products, the Treasury Amendment is to off-exchange foreign currency products. The *Dunn* Court favored a broad reading of the Treasury Amendment and held that it exempted options in future currency by its very terms. This

Court held that it was "quite natural" to read the Treasury Amendment's exemptions of transactions and foreign currencies as a complete exclusion of that commodity from the regulatory scheme. The Fifth Circuit's opinion is silent as to the *Dunn* reasoning. Applying the *Dunn* reasoning to the present case, the precise wording of the Energy Exemption, coupled with the Commission's interpretation of the Exemption, leads to the inescapable conclusion that Petitioner's actions are excluded from coverage under § 13(a)(2) except to the extent that section prohibits manipulation of the market price. The Commission retained coverage over manipulations, both civil and criminal, but exempted everything else.[12]

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's novel interpretation of a federal criminal law creates an important question that must be settled by this Court.

Title 7 U.S.C. § 13(a)(2) is ambiguous regarding what *mens rea* is necessary for a violation. The Fifth Circuit's opinion that the statute does not require manipulative intent is not based on any congressional intent and is not based on a plain reading of the

[12] As is shown by both the concurrences and the dissent, the CFTC even exempted the off-exchange energy markets from the anti-fraud portions of the CEA.

statute. The statutory elements the United States must prove to impose criminal liability is an important question that must be settled by this Court.

B. The Judgment of the Court of Appeals Below Conflicts Directly with the Judgment of the United States Court of Appeals for the Eighth Circuit.

The judgment of the Court of Appeals conflicts with *Utesch v. Dittmer,* 947 F.2d 321, 325 (8th Cir.1991). There, the Eighth Circuit held that an allegation under this sentence of § 13(a)(2) would require a showing of an intent to manipulate. The court below states that the only intent requirement for a violation of this law is a knowing delivery of a knowingly false statement, which then "tends to affect the price of a commodity." This decision conflicts with *Utesch*, in that the Eighth Circuit necessitates manipulative intent for a violation of § 13(a)(2). The lack of unanimity between the federal Circuits will lead to confusion within the marketplace and inconsistent regulation.

C. The Judgment of the Court of Appeals is Inconsistent With This Court's Reasoning in *CFTC v. Dunn*

The uncertainty created by the Fifth Circuit's lack of a full analysis regarding the 1993 Energy Exemption is exacerbated by this Court's analysis in

Dunn. In *Dunn* this Court held that the Treasury Amendment, which stated "nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency," acted as a complete exclusion of all activities in relation to foreign currency. This is a narrower exemption than the Energy Exemption. The Energy Exemption specifically states that it encompasses not only "transactions" but persons "rendering other services" in regard to these pre-existing contracts. By avoiding the *Dunn* analysis, the Court below avoided a complete statutory exclusion of Petitioner and his actions from coverage by the CEA.

D. The Question of Fair Notice to Petitioner is an Important Question of Law that Should Be Settled by this Court

The Commodity Futures Trading Commission and the Department of Justice cannot agree whether a violation of 7 U.S.C. § 13(a)(2) requires an intent to manipulate the market. It is unreasonable to say that Petitioner was on notice that by sending false information to a newspaper reporter he was violating the Commodity Exchange Act. The Fifth Circuit's interpretation judicially expands the statute to include actions never before regulated by the Commodity Exchange Act. This expansion violates Petitioner's right to due process of law.

E. The Judgment of the Court of Appeals Below is Inconsistent with the Position of the United States

The off-exchange forward contracts at issue in this case are part of an established market in natural gas. As stated by the CFTC itself, this entire market is exempted from the Commodity Exchange Act except to the extent that there is an allegation of manipulation. The CFTC has consistently alleged manipulation in § 13(a)(2) violations while the Department of Justice has *not*. This inconsistency regarding the Government's interpretation and enforcement of a federal criminal statute is grounds for review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20248

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JERRY ALFRED FUTCH, JR

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CR-511

(Filed May 15, 2008)

Before GARWOOD and CLEMENT, Circuit Judges.*

PER CURIAM:**

Jerry Alfred Futch, Jr. pleaded guilty to one count of false reporting in violation of 7 U.S.C. § 13(a)(2) and agreed to waive all non-jurisdictional appeals. Futch was sentenced to fifty-seven months of imprisonment under the United States Sentencing Guidelines. He appeals the factual and jurisdictional bases for his plea. Futch also raises issues regarding the procedures used in his sentencing, which are barred by the waiver of appeal in his plea agreement. Finding no error, we affirm the plea agreement and sentence.

I. FACTS AND PROCEEDINGS

Futch was a natural gas trader for Reliant Energy ("Reliant") in Houston, Texas. On November 29, 2000, Futch responded by e-mail to a survey conducted by the Washington, D.C.-based natural gas industry publication *Inside FERC Gas Market Report* (*"Inside FERC"*). Futch reported that Reliant had entered into "twelve fixed-price baseload trades of

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* Judge Elrod was a member of the panel, but did not participate in this decision. The case is being decided by a quorum. 28 U.S.C § 46(d).

** Pursuant to 5TH CIR. R. 47.5, this Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

natural gas" at "Transco Zone 6" on November 28, 2000. At the time he sent the e-mail, Futch knew that Reliant had not entered into any of the trades at the prices and volumes he reported.

The survey to which Futch falsely responded was a monthly survey performed by *Inside FERC* to learn the prices at which energy companies bought and sold natural gas. *Inside FERC* used this data to calculate an index price for natural gas. Energy companies like Reliant traded natural gas at prices tied to the index price. Other energy companies, including public utilities, purchased natural gas under long-term contracts tied to the index price. Owners of natural gas mineral rights (including, for example, the State of Texas) received royalties tied to the index price calculated by *Inside FERC* and other energy publications. Index prices also affected the price of natural gas futures contracts traded on the New York Mercantile Exchange ("NYMEX").

Natural gas travels in interstate commerce through a national pipeline system. Because contracts for future delivery of natural gas are traded on the NYMEX, natural gas is a commodity under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq.*

On November 17, 2004, Futch was indicted on four counts of knowingly delivering inaccurate reports concerning market information that tended to affect the price of natural gas, in violation of 7 U.S.C. § 13(a)(2). On June 9, 2005, Futch filed two motions to dismiss the indictment, arguing that § 13(a)(2) was

unconstitutionally vague and overbroad.[1] On June 16, 2005, Futch pleaded guilty to one count of false reporting under § 13(a)(2) and agreed to waive his right to appeal "the sentence imposed or the manner in which it was determined." Futch also waived his right "to contest his conviction or sentence by means of any post-conviction proceeding."

Prior to sentencing, Futch moved to dismiss the indictment because of prosecutorial misconduct. He twice moved for an evidentiary hearing regarding the loss calculations in his presentence report ("PSR"). The district court denied Futch's motions. Following both parties' submission of expert reports concerning the amount of loss caused by Futch's actions, the district court adopted the recommendations of the PSR and sentenced Futch to fifty-seven months of imprisonment, the upper end of the Guidelines range for his offense. Futch now appeals.

II. STANDARD OF REVIEW

We review the district court's determination that Futch's plea agreement had an adequate factual basis for plain error, because Futch presents "a plain, straightforward issue of law: is the undisputed factual

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[1] On July 11, 2005, Futch filed a motion requesting that the court set a deadline for the government to respond to his June 9 motions. On July 18, Futch filed a motion to withdraw his July 11 motion. The district court granted the motion to withdraw on July 20, 2005.

basis sufficient as a matter of law to sustain his plea." *United States v. Johnson,* 194 F.3d 657, 660 (5th Cir. 1999), *vacated on other grounds,* 530 U.S. 1201 (2000). We review the validity of Futch's appeal waiver *de novo. United States v. Burns,* 433 F.3d 442, 445 (5th Cir. 2005). Futch's guilty plea does not waive his jurisdictional challenges, which include the "claim that – *judged on its face* – the charge is one which the State may not constitutionally prosecute." *United States v. Broce,* 488 U.S. 563, 575 (1989) (internal quotations omitted). We review Futch's constitutional challenges to § 13(a)(2) and his challenge to the district court's statutory interpretation *de novo. United States v. Santos-Riviera,* 183 F.3d 367, 369 (5th Cir. 1999).

III. DISCUSSION

A. Voluntariness of the plea agreement

Futch's guilty plea and waiver of appeal foreclose all non-jurisdictional challenges to his conviction and sentence. *United States v. Owens,* 996 F.2d 59, 60 (5th Cir. 1993) (citing *United States v. Jennings,* 891 F.2d 93, 95 (5th Cir. 1989)). However, Futch's waiver of appeal does not bar claims based on the voluntariness of his plea. *United States v. Finney,* 225 F.App'x 246, 246 (5th Cir. 2007) (per curiam) (unpublished).

"Due process requires that a guilty plea be a knowing and voluntary act; the defendant must be advised of and understand the consequences of the plea." *United States v. Pearson,* 910 F.2d 221, 223 (5th

Cir. 1990). In this Circuit, "[a]s long as the defendant understood the length of time he might possibly receive he was fully aware of his plea's consequences." *United States v. Santa Lucia,* 991 F.2d 179, 180 (5th Cir. 1993) (internal quotations omitted).

At his rearraignment, the district court reviewed the plea agreement with Futch, including the waiver-of-appeal provisions. Futch stated that he understood that his plea waived any non-jurisdictional challenges to his conviction. Futch also stated that he understood that the statutory maximum penalty for his crime was a five-year prison term and a $500,000 fine. Futch and his attorney also signed an addendum to the plea agreement attesting that his attorney had "fully explained" Futch's rights and reviewed the applicable sentencing guidelines with him. Futch and his attorney both attested that Futch's decision to enter into the plea agreement was "an informed and voluntary one." We hold that his plea agreement was knowing and voluntary and that Futch has waived all non-jurisdictional challenges to his conviction and sentence.

B. Basis for the plea agreement

"A guilty plea does not waive the right of a defendant to appeal a district court's finding of a factual basis for the plea on the ground that the facts set forth in the record do not constitute a federal crime." *United States v. Reasor,* 418 F.3d 466, 470 (5th Cir.

2005). Futch was indicted under 7 U.S.C. § 13(a)(2), which makes it a felony for

> [a]ny person . . . knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce . . . false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce. . . .

To state a claim for false reporting, the prosecution must allege "(1) that a defendant knowingly delivered market reports or market information through interstate commerce, (2) that the information was knowingly false or misleading; and (3) that the information affected or tended to affect the price of a commodity in interstate commerce." *United States CFTC v. Atha*, 420 F. Supp. 2d 1373, 1380 (N.D. Ga. 2006) (citing *United States v. Valencia*, 394 F.3d 352, 356-57 (5th Cir. 2004)). At the rearraignment, Futch admitted that he knowingly delivered false sales reports to *Inside FERC* via e-mail sent from Texas to Washington, D.C., that he knew that this information was false, that he knew that this information tended to affect the index price published by *Inside FERC*, and that he knew that the index price tended to affect the price of natural gas. He also admitted that natural gas was a "commodity" under the CEA.

Futch argues that the factual basis for his plea was deficient, because the natural gas "spot" or "swap" transactions in which Futch engaged are

exempted from the oversight of the Commodity Futures Trade Commission ("CFTC"), the regulatory body charged with enforcing the CEA. Futch argues that the CEA should never have been applied to him. Futch cites to the legislative history of the CEA, statutory language in 7 U.S.C. § 2(g)-(i), and a 1993 CFTC Final Order exempting certain energy markets from CFTC regulation. 7 U.S.C. § 2(g)-(h); Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21286, 21294-95 (May 20, 1993) [hereinafter 1993 Final Order].

Futch's argument is without merit because the statutory and regulatory provisions he cites do not apply to his conduct. Subsections 2(g) and 2(h) of the CEA were part of the Commodity Futures Modernization Act, which became law in December 2000, after the offense conduct at issue here.[2]

Even if these subsections had been in force when Futch sent his false report to *Inside FERC,* they would not exonerate him. Subsections 2(g)-(i) exempt "agreement[s], contract[s] or transaction[s]" in, *inter alia,* the natural gas markets, from CFTC oversight. 7 U.S.C. §§ 2(g), (h)(1), (i)(1). Futch was not indicted for entering into an "agreement, contract or transaction," but for distributing false market information

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[2] According to the Library of Congress records, the Commodity Futures Modernization Act, H.R. 5660, was incorporated by reference in the conference report to H.R. 4577. H.R. 4577, the Consolidated Appropriations Act of 2001, became Public Law 106-554 on December 21, 2000.

under § 13(a)(2). The federal courts which have evaluated § 13(a)(2)'s false reporting offense have concluded that it extends to "any commodity in interstate commerce" and is not limited to futures contracts regulated by the CFTC. *See, e.g., United States CFTC v. Reed,* 481 F. Supp. 2d 1190, 1198 (D. Colo. 2007); *United States v. Reliant Energy Servs., Inc.,* 420 F. Supp. 2d 1043, 1061 (N.D. Cal. 2006). Federal courts have found that "false reporting of market information concerning natural gas and attempted manipulation of natural gas price indices does not implicate an agreement, contract or transaction" and thus does not come under the exceptions in 7 U.S.C. § 2(g)-(h). *Reed,* 481 F. Supp. 2d at 1198 (internal quotations omitted); *Atha,* 420 F. Supp. 2d at 1380; *United States CFTC v. Bradley,* 408 F. Supp. 2d 1214, 1219 (N.D. Okla. 2005); *United States v. Valencia,* No. H-03-024, 2003 U.S. Dist. LEXIS 15264, at *32-36 (S.D. Tex. Aug. 25, 2003), *vacated in part on other grounds,* U.S. Dist. LEXIS 24327 (S.D. Tex. Nov. 13, 2003), *rev'd on other grounds,* 394 F.3d 352 (5th Cir. 2004).

The 1993 Final Order explicitly states that § 13(a)(2) continues to apply to the energy markets that are otherwise exempted from the CEA by the order. 58 Fed. Reg. at 21291. Because the statutory and regulatory language is clear, we need not consider the legislative history. *Valencia,* 394 F.3d at 355 n.2. We hold that § 13(a)(2) applies to Futch's conduct as charged in the indictment and that the

district court did not err when it found that Futch's plea agreement had an adequate factual basis.

C. Jurisdictional challenges to the plea agreement

(1) Unconstitutional overbreadth

Futch argues that § 13(a)(2) is unconstitutionally overbroad because it is a limitation on speech which is not narrowly tailored to promote the interests set out in the findings and purpose section of the CEA. *See* 7 U.S.C. § 5. A prior panel of this Court has held that § 13(a)(2) is not constitutionally overbroad because it only criminalizes knowingly false speech, which is not constitutionally protected speech. *Valencia,* 394 F.3d at 355-57; *accord Reed,* 481 F. Supp. 2d at 1198-99; *see also Colson v. Grohman,* 174 F.3d 498, 507 (5th Cir. 1999) ("[I]ntentional or reckless falsehood, even political falsehood, enjoys no First Amendment protection."). Futch's overbreadth argument is foreclosed by *Valencia.*

(2) Unconstitutional vagueness

Futch argues that § 13(a)(2) contains terms that are too vague to support a criminal conviction. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

Vagueness challenges to statutes which, like § 13(a)(2), "do not involve First Amendment freedoms" should be "examined in the light of the facts of the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550 (1975).

Futch argues that the terms "any person," "market," "information and conditions," "price," "tends to affect," "for transmission" and "commodity" are unconstitutionally vague. Futch argues that the term "any person" is vague because it could be interpreted either to include "any person" already regulated by the CEA, or "any person" who makes a statement about any commodity in interstate commerce. We reject this argument. The term "person" is defined broadly in 7 U.S.C. § 1a(28) to include "individuals, associations, partnerships, corporations, and trusts." Section 13(a)(1) is limited to "[a]ny person registered or required to be registered" under the CEA. The contrast between the limitations in § 13(a)(1) and the use of the phrase "any person" in § 13(a)(2) clearly indicates that Congress intended to include a broader class of persons under § 13(a)(2). *See Russello v. United States,* 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations omitted)). The phrase "any person" as it is used in § 13(a)(2) is not vague.

Futch argues that the term "market" is vague because it could (as the government urges here) refer to any market for a commodity in interstate commerce, or (as Futch urges) refer only to markets regulated under the CEA. We first note that the statute only applies to "market information" that "affect[s] or tend[s] to affect the price of any commodity in interstate commerce." The term "market" is thus limited by the other terms of § 13(a)(2). Further, looking at the statutory language in light of the facts of Futch's plea, the term "market information" is not vague because Futch's false statements about the time, place, price, and volume of Reliant's natural gas trades clearly qualified as "market information" under almost any definition of the term. *See Mazurie,* 419 U.S. at 550 ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.").

Futch argues that the terms "information" and "conditions" are vague because they overlap. We reject this argument because the fact that "market information" and "market conditions" may overlap does not make them unconstitutionally vague. *See United States v. Batchelder,* 442 U.S. 114, 123 (1979) ("So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.").

Futch argues that the term "price" is overbroad and should be read as "market price" in light of other

sections of the statute, such as 7 U.S.C. §§ 9 and 2(h)(2)(C), which use the term "market price." However, Futch has not established that judicially inserting the word "market" would add clarity to § 13(a)(2). In the context of a natural gas contract, this Court has stated that the "[m]arket price is the price that is actually paid by buyers for the same commodity in the same market." *Shamrock Oil & Gas Corp. v. Coffee,* 140 F.2d 409, 410 (5th Cir. 1944); *see also Cargill, Inc. v. Hardin,* 452 F.2d 1154, 1166 (8th Cir. 1971) (construing 7 U.S.C. §§ 9 and 13 and finding that the "market" for a commodity is "composed of products that have reasonable interchangeability for the purposes for which they are produced-price, use and qualities considered" (internal quotations omitted)). Given this broad definition, adding the term "market" to modify "price" would not significantly alter the scope of § 13(a)(2). In addition, as with the term "market information" above, Futch has not shown that § 13(a)(2) was vague in light of the facts of this case. *See Mazurie,* 419 U.S. at 550. Futch judicially admitted that his false reports tended to affect the index price of natural gas and that the index price affected the price of gas in a wide variety of markets, including the price of natural gas futures on the NYMEX.

Futch argues that the term "tends to affect" is vague. He cites to *Mattern v. Eastman Kodak Co.,* where this Court referred to actions under Title VII that "would tend to deprive" employees of "opportunities" as "vague harms." 104 F.3d 702, 709 (5th Cir.

1997) (discussing 42 U.S.C. § 2000e-2(a)(1), (2)), *abrogated on other grounds by Burlington N. & Santa Fe Ry. v. White*, 126 S.Ct. 2405 (2006). The *Mattern* court did not find, however, that it was impermissible for Congress to impose civil penalties for inflicting these "vague harms" on their employees. *Id.* Futch also cites to Justice Kennedy's dissent in *Hill v. Colorado*, which states that "[i]n the context of a law imposing criminal penalties for pure speech, 'protest' is an imprecise word; 'counseling' is an imprecise word; 'education' is an imprecise word. No custom, tradition, or legal authority gives these terms the specificity required to sustain a criminal prohibition on speech." 530 U.S. 703, 773 (2000) (Kennedy, J., dissenting). We first note that, unlike the Colorado clinic-access law at issue in *Hill*, § 13(a)(2) only penalizes unprotected false speech. Second, we note that in the context of § 13(a)(2), the phrase "tends to affect" operates to limit the scope of the prohibited false speech. Finally, we note that even if the phrase "tends to affect" were found to be vague in some factual contexts, it is sufficiently clear to have put Futch on notice that providing false sales data in response to *Inside FERC*'s monthly index survey violated the law. *See Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952).

Futch argues that the term "for transmission" in the phrase "deliver for transmission" is vague. He argues that "for transmission" is vague because it must have a meaning distinct from "deliver" in order to avoid surplusage. This argument is without merit.

The Universal Commercial Code defines the word "Send" as "to deposit in the mail or deliver for transmission. . . ." U.C.C. § 1-201(b)(36)(A). In the present context, the phrase "deliver for transmission" is a synonym for "send" and is not unconstitutionally vague.

Futch finally argues that the term "commodity" is vague because it is "reasonable" to believe that natural gas is not a "commodity" under the CEA. The CEA defines "commodity" to include "all . . . goods and articles . . . in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(4). He argues that the false natural gas sales at issue in this case did not involve a commodity because the futures contracts for natural gas that are traded on the NYMEX state that they are for gas "delivered at Henry Hub, Louisiana" and the gas in this case was delivered at "Transco Zone 6." His arguments on these points are frivolous and we reject them. Henry Hub is the nexus of several major natural gas pipelines. The Henry Hub clause in the NYMEX futures contracts merely specifies the location for gas delivery and does not in any way limit the type of commodity in question, natural gas. We also observe that Futch admitted in his plea agreement that natural gas was a commodity in interstate commerce under the CEA.

D. Sentencing issues

Futch acknowledges that "a valid waiver of appellate rights would bar appellate review" of the

sentencing issues he raises. His plea agreement states that "[d]efendant is aware that 18 U.S.C. [§] 3742 affords a defendant the right to appeal the sentence imposed. The defendant waives the right to appeal the sentence imposed or the manner in which it was determined."[3] The district court reviewed this provision with Futch at his rearraignment and Futch stated that he understood it. As discussed above, Futch's waiver of appeal was knowing and voluntary. His sentencing challenges are therefore foreclosed.

IV. CONCLUSION

We AFFIRM Futch's conviction and sentence.

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[3] The plea agreement also states that "the defendant may appeal *only* a sentence imposed above the statutory maximum." Futch's sentence was fifty-seven months, which is less than the statutory maximum of five years for his offense.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 20, 2008

Chris Flood,

The following entry has been docketed in 5th circuit number 06-20248.

> Date: 08/20/08 Event: Court Order filed.
>
> COURT Order filed DENYING petition for rehearing [6037700-1], DENYING petition for rehearing en banc [6037701-1] With Poll (Y/N)?: n Mandate pull date is 8/27/08. Copies to all counsel. [06-20248]

This notice is provided for informational purposes only. Any correspondence normally forwarded has been mailed in accordance with our usual procedure. Any questions concerning the case(s) listed above should be directed to a member of the appropriate case team.